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Supreme Court of the United States

OCTOBER TERM, 1937.

Nos. 773, 774 and 775.

AETNA INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD., formerly Union Marine Insurance Company, Ltd.,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BOSTON INSURANCE COMPANY,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF.

D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
MARTIN DETELS,
Counsel for Petitioners.

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PETITIONERS' REPLY BRIEF.

The respondent's brief appears to be based largely upon a misapprehension of the argument for the petitioners, and upon a misunderstanding of the real issues in the case. We file this reply in the hope that it will narrow the issues and avoid some of the confusion which must necessarily result when opposing arguments are not addressed to the same question.

1. Respondent mistakenly argues that the petitioners rely on the dictum in the *Armstrong* case.

On page 28 of its brief respondent says:

> "Petitioners' contention, or so much of it as now remains, is based on a dictum in *North of England Association* v. *Armstrong*, L. R. 5 Q. B. 244."

Similar statements appear elsewhere throughout the brief.

We endeavored to make it clear in our principal brief that we do not rely on the dictum in the *Armstrong* case, but only on the actual decision in that case. We rely on the law as laid down in *The St. Johns* (101 Fed. 469) and *The Livingstone* (130 Fed. 746), which followed the decision in the *Armstrong* case, but rejected the dictum in that case. We contend that these cases represent the settled law of the United States; that they are supported by the statement of this Court in *Mobile & Montgomery R. Co.* v. *Jurey* (111 U. S. 584, 594); and that there is absolutely no authority to the contrary.

2. The respondent mistakenly argues that the rule in the *Armstrong* case has no application to cases of total loss.

Throughout its brief the respondent contends that the doctrine of the *Armstrong* case applies only to cases of partial loss and has no application to cases of total loss. This argument is fundamentally erroneous and is exactly contrary to the fact. The truth of the matter is that the doctrine of the *Armstrong* case applies primarily to cases of total loss and, in the very nature of things, can very rarely apply to cases of partial loss. Under a hull policy, partial losses are paid in full by the underwriters, so that the assured is fully indemnified for his entire actual loss. The point decided in the *Armstrong* case, however, can

only arise where the assured has an actual loss for which he has not been compensated by his insurance. As a matter of fact, almost all of the cases in which the rule of the *Armstrong* case has been applied are cases of total loss. See, in this connection, *North of England Association* v. *Armstrong,* L. R. 5 Q. B. 244; *The St. Johns,* 101 Fed. 469, at page 471*; *The Livingstone,* 130 Fed. 746; *Federal Insurance Co.* v. *Detroit Fire & Marine Insurance Co.,* 202 Fed. 648; *Thames & Mersey Marine Ins. Co.* v. *British & Chilian S. S. Co.* (1915), L. R. 2 K. B. 214.

Curiously enough, in the only case we have been able to find where the principle of the *Armstrong* case was applied to a partial loss, the argument for the shipowners was just the opposite of the argument made by this respondent. They argued that the rule in the *Armstrong* case applied only in cases of total loss and could not apply to a partial loss. That contention was overruled. *Goole & Hull Steam Towing Co.* v. *Ocean Marine Ins. Co.* (1928), 1 K. B. 589, at pp. 596-7. The *Goole & Hull Steam Towing Co.* case, however, was a partial loss of a somewhat peculiar character. Although the vessel was repaired, the repairs cost more than the insured value. The case is peculiar in another respect, namely, that the recovery from third parties was effected before payment by the underwriters, and was set up by the underwriters as a credit; but we think that circumstance has no bearing on the principle involved.

As the latest decision in which the rule of the *Armstrong* case has been applied, the *Goole & Hull Steam Towing Co.* case is of particular interest, and we believe this Court will find the entire opinion of McKinnon, *J.,* worthy of careful consideration. We

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* *As appears from this citation, the respondent is mistaken in its statement that* THE ST. JOHNS *was a partial loss case.*

call attention to the following statement in the opinion (p. 594):

> "The real question in any case is: What is the measure of indemnity that by the convention of the parties has been promised to the assured? That may in some cases be less than an ideal pecuniary indemnity, in some cases it may be more. If the assured has undervalued his ship in the valuation he has agreed upon, he may find that he has suffered pecuniary loss outside the agreed indemnity."

3. The respondent's brief concedes the correctness of *The Livingstone* decision which squarely supports the argument of the petitioners.

It appears from the respondent's brief that the respondent accepts *The Livingstone* decision as correct. The respondent refers to that case as "a landmark decision" (p. 15), and says that

> "*The Livingstone* represents the true principle of subrogation" (p. 35).

At another place in its brief (p. 25) respondent refers to *The Livingstone* as a case "which has stood for years."

It appears, therefore, that both parties accept *The Livingstone* as a correct exposition of the law and only disagree as to the interpretation of that decision. We believe that this Court will have very little difficulty in determining what was decided in *The Livingstone*. The record in that case was filed with this Court in connection with the application for certiorari (No. 692. *World Marine Insurance Co. Ltd.* v. *Lackawanna Transportation Co.*, 194 U. S. 637). An exam-

ination of the pleadings and assignments of error discloses that all of the issues in the case were vigorously litigated, and that both sides claimed more than they actually received. While the proceedings on the motion for reargument are not in the record filed with this Court, it appears from the opinion below that this motion specifically brought to the attention of the Circuit Court of Appeals the fact that underwriters had been preferred in the distribution of the recovery (R., pp. 111, 112). Accordingly, it was not through mere inadvertence that the judgment actually entered was exactly in accordance with the last two paragraphs of the opinion.

In considering what was decided in *The Livingstone* it should be borne in mind that the respondent and the Circuit Court of Appeals disagree on this question. The Circuit Court of Appeals concedes that it did actually decide as the petitioners contend, and suggests, as we understand it, that the decision was not well considered. The respondent, on the other hand, apparently takes the position that *The Livingstone* was correctly decided, but that it is distinguishable from the present case.

The respondent's argument on this point is largely based on the fact that the underwriters who insured the sunken vessel ("The Grand Traverse") also insured the colliding vessel ("The Livingstone") and were liable for whatever amount her owners could be compelled to pay. That this circumstance played no part in the *Livingstone* decision clearly appears from the following passage in the opinion in that case:

> "The contention that the appellees are entitled to some consideration because they had written policies upon the 'Livingstone' by which they bound themselves to pay any loss for which she

> might become legally liable seems to us irrelevant to the present issue". (130 Fed. Rep. at p. 750).

In discussing the decision of the Circuit Court of Appeals in the present case, the respondent says (at p. 16 of its brief):

> "The Court held that the decision of *The Livingstone* was complete authority and that the Court in that case expressly approved the rules applied in this case, and that the statement in the opinion of that Court concerning payment of costs did not involve any ruling on the question of subrogation."

After repeated and painstaking examinations of the opinion of the Circuit Court of Appeals in the present case, we can find no justification whatever for the foregoing statement. Our understanding is that the court below recognized that its decision in this case was contrary to its decision in *The Livingstone.*

The respondent seems to attach a great deal of significance to the fact that, in the present case, counsel were jointly retained by the hull underwriters and the respondent, to prosecute the collision suit. We are unable to follow respondent's argument on this point. The underwriters were entitled to proceed in the name of the respondent, *U. S.* v. *American Tobacco Co.,* 166 U. S. 468 at page 474. The respondent also had an interest in the litigation; first, because of the line which it carried as a self insurer, and second, because of the possibility that the litigation might result in a surplus to which the respondent would be entitled under the rule laid down in *The St. Johns* and *The Livingstone.* Under these circumstances the manner in which the litigation was begun and prosecuted was most appropriate.

4. It is impossible to ascertain from the respondent's brief what method of adjustment it considers correct.

Where the agreed valuation and the amount of insurance are less than the actual value of the insured vessel, there are three possible methods of dividing a recovery from third party tort feasors.

(a) The first possible method is to allow the assured to retain any recovery until he has been fully reimbursed for the actual value of the vessel, so that the underwriters receive only the surplus, if any, which remains after the assured has been fully reimbursed. So far as we are aware, no one contends or has ever contended for this method of apportionment in any marine insurance case.

(b) The second possible method of adjustment is to treat the assured and his underwriters as coinsurers, apportioning the recovery over the entire actual value of the vessel and ignoring the agreed valuation. So far as we know, this method of apportionment has never been adopted or even seriously considered in connection with hull insurance prior to the present case, but in this case the Circuit Court of Appeals seems to have had some such method in mind. The question necessarily remains in doubt because the actual result of the Circuit Court of Appeals decision was a sort of compromise between this method of apportionment and the method described in the preceding paragraph. The assured more than repaid itself in full, but repaid its underwriters only about 89% of their loss. Counsel for the assured take an equally inconsistent position in this Court; they seem to favor the co-insurance theory, but they seek to defend an apportionment under which the assured fares better than any of the underwriters. By assuming a state of facts contrary to the pleadings (*cf.*

Respondent's Brief, pp. 5, 6, 7 and Petitioners' Brief, p. 36), respondent attempts to demonstrate that the total amount which it received was some $71,000 less than the actual value of the vessel, instead of approximately the same amount in excess of her actual value, as shown in petitioners' brief (pp. 3 to 6).* But, even accepting these figures, the respondent's percentage of loss on the excess of actual over agreed value (about 6⅓%)** is substantially less than the underwriters' percentage of loss on the insured value (about 11%). In other words, the respondent cites no authority for the co-insurance method of apportionment, and did not even follow that method in this case. Furthermore, as we shall point out, some of respondent's statements are wholly inconsistent with the co-insurance theory.

(c) The third possible method of dealing with such a recovery is to apply the recovery first to the reimbursement of hull underwriters. This is the method followed in the *Armstrong* case, *supra; The St. Johns, supra; The Livingstone, supra* and the *Federal Insurance Company* case, *supra,* and we know of no

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*Even on the respondent's own figures, it would have received payment in full excepting for the payment ($85,999.64) which it made to English P. P. I. underwriters, and which it was admittedly under no legal obligation to make. Furthermore, the item of "recovery for interests other than hull", on page 6 of respondent's brief, includes $11,693.02, recovered in respect of equipment which was unquestionably a part of the subject matter insured (see note on p. 4 of our principal brief) and was so treated by the respondent's brokers (p. 42 of Recovery Statement, Exhibit 9). By its ingenious treatment of the two items above mentioned, aggregating $97,692.66, the respondent turns a profit of $26,408.21 into a loss of $71,284.45. If the respondent had chosen to increase its gratuity to the English P. P. I. Underwriters by, say, an additional $100,000, its loss would, on its theory, have been just so much greater.

**Respondent's alleged net loss, $71,284, divided by $1,117,390 (the excess of actual value, $1,750,000, over agreed value, $632,610).

case in which any other method of apportionment has ever been applied to hull insurance. Where the actual recovery exceeds the amount required for the complete reimbursment of underwriters, a special question is presented as to the disposition of the surplus. On this question we have the dictum in the *Armstrong* case that the surplus belongs to the underwriters; the dictum in *The St. Johns* that it belongs to the assured; and the decision in *The Livingstone*, to the same effect as the dictum in *The St. Johns*.

If the foregoing discussion is longer and more detailed than might be expected in a reply brief, we can only say, in justification, that the respondent's brief contains a number of statements which we find definitely confusing. Thus respondent states in its brief (p. 14) that underwriters pay partial losses in full, whereas in cases of total loss "they pay merely the total amount of the policy", and then goes on to make the following statement:

> "In the case of such total loss the underwriters are subrogated to any recovery to the extent of the amount paid under their policies, and the owner is entitled to the balance. *The Livingstone* (C. C. A. 2), 130 Fed. 746."

We are unable to understand how the respondent can reconcile the foregoing statement with the coinsurance theory, or indeed, with any theory which denies to the underwriters priority in the distribution of recoveries. The passage above quoted is a correct (although incomplete) statement of the rule applied in *The Armstrong* case and in *The St. Johns*.

Later on, the respondent says (at p. 22 of its brief):

> "If the underwriter pays 100% of the loss, he owns the entire cause of action; if he pays 50%

of the loss, he owns half the cause of action and the assured owns the other half."

The only loss with which the underwriters is concerned, of course, is the loss of the agreed value; and his share in the recovery is determined by comparing the amount of his payment with the insured value.

5. The principles laid down in *The St. Johns* and *The Livingstone* are not limited to cases where the recovery is less than the insured value. These principles apply to the present case and are controlling of all of the issues presented on this appeal.

The respondent's argument appears to proceed on the theory that cases where the net recovery exceeds the agreed valuation fall in a separate class and involve wholly different principles from those cases where the net recovery is less than the amount which has been paid out by underwriters. We submit that there is no such distinction. Where the amount sued for (*i. e.,* the actual value) is greater than the agreed valuation, the question necessarily arises whether the recovery is to be apportioned over the actual value or the insured value; *i. e.,* whether the underwriters are to be treated as co-insurers with the assured or as having a prior right in the recovery. In every case where the question has arisen squarely under a hull policy, it has been held that the underwriters have a prior right of reimbursement. The only limitation on that right is the equitable limitation suggested in *The St. Johns* and applied in *The Livingstone.* That limitation has nothing to do with co-insurance but is based on a purely equitable principle. In effect, the rule of *The Livingstone* treats the underwriters as in possession of the entire recovery, but holds that after they have been fully reimbursed they hold any surplus in trust for the assured. This resulting trust at-

taches only to any surplus which, in the hands of the underwriters, would constitute a profit on the transaction. This principle is expressed in *The Livingstone* opinion as follows:

> "The title of the insurers, by virtue of the valued policies, abandonment and conveyance, to the physical property and to salvage, may well be conceded, as may also their right to share in the recovery to the extent of full and complete reimbursement for all losses and expenditures made by them incident to the insurance. We are fully convinced that equity and good conscience do not require the court to go further and permit them to realize an enormous profit from the transaction" (130 Fed. Rep. at p. 751).

When *The Livingstone* decision is properly understood, the right of the petitioners to receive interest is clear. It is equally clear that all expenses of the litigation must come out of the fund and that none of such expenses can be deducted from the interest of the petitioners. This necessarily follows from the nature of the limitation applied in *The Livingstone*, which does not come into operation until the underwriters have received "full and complete reimbursement".

Throughout its brief the respondent minimizes the importance of the agreed valuation, and harps upon the supposed hardship to which the respondent would be subjected if the claim of the petitioners were sustained. Obviously there is no merit in this sort of argument if the petitioners are correct in their claim that the meaning and effect of the valuation clause is well settled and well understood. As Judge Addison Brown pointed out many years ago, shipowners undervalue their vessels for definite reasons of econ-

omy, and they can have no complaint when the underwriters exercise equally definite rights which accrue to them by virtue of the undervaluation. Respondent denies that the decision in the *Armstrong* case has ever been generally accepted, but it does not cite a single instance where any shipowner has received a dollar out of any recovery from third parties until the hull underwriters had been fully reimbursed. Respondent cites no decision in its favor because there is none; and although its insurance is handled by very able and prominent brokers, it did not put them on the witness stand to testify to any custom or practice to apportion recoveries contrary to the *Armstrong* decision, nor did it even undertake to prove an isolated instance of any such apportionment. There is only one possible explanation of respondent's failure to offer evidence on this point, and that explanation is the true one, *i. e.*, that the rule of the *Armstrong* case, *The St. Johns* and *The Livingstone* has been universally accepted, and any reputable broker or underwriter would have to admit that fact if placed on the witness stand.

6. There is nothing in the decision of this Court in *The Gulf Refining Co.* v. *Atlantic Mutual Insurance Company* which lends support to the respondent's argument.

The respondent argues that in the *Gulf Refining Company* case (279 U. S. 708) this Court overruled Judge Addison Brown's decision in the case of *International Navigation Co.* v. *Atlantic Mutual Insurance Company,* 100 Fed. 304. We submit that there is no foundation for this argument. The *International Navigation Company* case followed the New York rule as to the adjustment of general average losses under hull policies. In the *Gulf Refining Co.* case this Court noted the fact that a different rule pre-

vailed in Massachusetts and pointed out that this Court had never adopted either rule. The question can scarcely be material in the present case, since the policies here involved expressly provide for the application of the New York rule (see our Principal Brief, p. 38). As the policies were all issued in New York the incorporation of the New York rule was entirely natural and proper.

Furthermore, the question how salvage and general average claims are to be adjusted has no necessary connection with the question how collision recoveries are to be apportioned. It is well-settled in all jurisdictions that claims for physical damage are paid in full to the amount insured; and where a vessel is physically destroyed, the rule of the *Armstrong* case may well be applied without reference to the method of settling salvage and general average claims. Indeed, the law in England is that recoveries are distributed in accordance with the decision in the *Armstrong* case, notwithstanding that salvage and general average claims are settled in accordance with the rule applied in the Massachusetts cases. See, in this connection, the opinion of this Court in the *Gulf Refining Company* case (at pp. 713-14), and the opinion of Scrutton, *J.*, in *Thames & Mersey Marine Insurance Co.* v. *British & Chilian S. S. Co.*, L. R. 2 K. B. 214 at page 221. In any event, even if it be true as suggested by Scrutton, *J.*, that there may possibly be some inconsistency between the reasoning of the *Armstrong* case and the English rule for adjusting hull general average claims (which is the same as the Massachusetts rule), that difficulty cannot arise in the present case, where the policies were issued in New York and stipulate for the New York rule.

The respondent seems to have misread the *Gulf Refining Company* case in other respects. Thus the respondent says in its brief (at p. 43):

> "Except in peculiar cases of partial loss in hull insurance the *Armstrong* error has never been accepted. This Court refused to follow it in a cargo case in which the principle of the *Armstrong* case was directly asserted. *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708."

The *Armstrong* case was not even mentioned by this Court in the *Gulf Refining Company* case, and we cannot understand how the principle of the *Armstrong* case could possibly be involved in the *Gulf Refining Company* decision.

The respondent's brief also states (at p. 44) that the Judge who decided *The St. Paul* case

> "failed to appreciate the fact, now well settled, that the agreed valuation is only a stipulation for liquidated damages."

This statement is not true even where the assured is a co-insurer, as under a cargo policy. In discussing the rule for the settlement of cargo losses, this Court said, in the *Gulf Refining Company* case (at p. 710):

> "It recognizes that the purpose of valuing the cargo is not to fix the maximum amount of recovery, which is accomplished by limiting the amount of the policy, but to eliminate from the risk which the insurer assumes so much of it as is consequent upon fluctuations of the market value of the cargo, whether the loss be total or partial."

Respondent lays stress on the statement of this

Court in the *Gulf Refining Company* case, that the effect of the agreed value is not dependent on estoppel. It is quite true, as this Court said in the *Gulf Refining Company* case (at p. 712) that:

> "The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a stipulation, in effect, that for purposes of computation of the insurance liability the cargo shall be taken at an agreed value."

A stipulation, however, is just as effective as an estoppel. Technically they are quite different, but the word "estoppel" is very often loosely used as a means of expressing the fact that a person is not free to take a position contrary to his contractual stipulations.

Respondent's brief states (at p. 51) that the respondent

> "expressly promised to pay the repair bills, up to the amount of their policies, in case of partial loss, * * *"

This statement appears to be based upon a misconstruction of this Court's decision in the *Gulf Refining Company* case, and of the clause in the hull policies quoted at the bottom of page 13 of the respondent's brief. That clause relates entirely to "charges and expenses". It has nothing to do with physical damage. So too, the opinion of this Court in the *Gulf Refining Company* case did not suggest that there was any question about the liability of hull underwriters to pay repair bills in full. The only question left open related to "charges and expenses", such as salvage and general average.

Finally, in any discussion or consideration of the

Gulf Refining Company case it must be borne in mind that it dealt with cargo insurance, and that it did not involve in any way the distribution of recoveries from third parties. There is nothing in the opinion in that case to support the following statement made in the respondent's brief (p. 48):

> "Every argument advanced by the petitioners was advanced in *Gulf Refining Co.* v. *Ins. Co.*, 279 U. S. 708, and all were refuted by this Court."

7. The permission to place additional insurance has no bearing on the construction of the valuation clause.

A considerable part of respondent's brief is devoted to the argument that when the hull underwriters waived any limitation on the amount of insurance which the respondent could take out on disbursements, etc., they indicated an intention to deal with the respondent as a co-insurer and apportion recoveries over the actual as distinguished from the agreed value. Whatever plausibility this argument may have, arises from a confusion of ideas in which the persons who placed the insurance evidently did not share. The permission granted by the underwriters was to insure "Disbursements and/or other interests". No doubt this language is literally broad enough to cover additional insurance on hull, but there are good reasons why it could not be so interpreted in practice, and it was not so interpreted in this case. The parties evidently understood that this clause was not intended as a permission to place other insurance on a parity with the hull insurance, but was intended to permit placing of the usual insurance against total loss only and without benefit of salvage. Under such policies it is immaterial how the interest insured is described, but it is to be noted that the only description specified in the permissive clause

was "disbursements". The permission to place the insurance and the actual method of placing it fit in precisely with Judge Addison Brown's reference to

> "the well-known practice of insuring against a total loss only a variety of different interests under the name of 'disbursements'; an interest so different, as to have no share in salvage on total constructive loss." (Petitioner's Principal Brief, p. 44.)

That the parties did not have in mind that the respondent would place additional insurance on hull is sufficiently plain when it is considered that the collection of such insurance would have afforded a defense *pro tanto* to the original hull underwriters, including these petitioners.

> "It is not denied that in an action on a valued policy the defendant may show in defense that the insured has already received the agreed value stated in the policy sued on from other insurers of the same identical interest." *The Fern Holme*, 46 Fed. 119, at p. 120; affirmed 50 Fed. 613, at p. 615.

The above rule has long been the settled law of England (where about half of the hull insurance on the "Almirante" was placed), and is incorporated in the (English) Marine Insurance Act of 1906,* Section 32, subdivision (2)(b), as follows:

> "Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured."

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* 6 Edw. 7, c. 41.

In view of this rule it would have been foolhardy for the respondent to place additional hull insurance in reliance on a permission to insure "disbursements and/or other interests", without any provision as to the relation between such additional insurance and the original hull insurance. It is plain that the parties intended that the respondent should do what it actually did; that is, place the additional insurance in a form which would not conflict with the hull insurance, thus following "the well-known practice" to which Judge Brown refers, and which was followed in *The Fern Holme, supra.*

Although the interest insured is differently described in the various P. P. I. policies (R., pp. 43, 45, 47, 49) it is to be noted that in the recovery statement they are all lumped together and treated alike, without any reference to the description of the subject-matter insured (Exhibit 9, pp. 4, 43-45, 51-52), and they are similarly dealt with in paragraphs 3 and 5 of the stipulations of agreed facts (R., pp. 40, 52, 57, 58). In paragraph 10 of its answers (R., pp. 9, 16, 23), respondent refers to all the P. P. I. policies as being "upon the SS. 'Almirante' for increased valuation."

8. The respondent makes a number of statements which are not supported by the record.

The respondent states (at p. 12 of its brief) that "the policies of Hull insurance involved in this litigation were unusual." There is nothing in the record to support this statement. The policies show that they were specially printed to cover the vessels of this respondent, as they bear its name and contain a list of the vessels insured.* So far as the terms of the

* We refer to the special policy form bearing the respondent's name. By the last paragraph of this form it supersedes the policy forms to which it is attached, and which are different in the case of each company.

coverage are concerned, however, there is not the slightest indication that the policies were unusual.

Respondent says that the petitioners claimed the entire recovery in the lower court (Petitioner's Brief, p. 28), while the lower court says we did not claim the whole recovery there but reserved the right to make such a claim in this Court (R. 108-9). Under these circumstances we trust that we may be permitted to state our actual position which has been from the beginning, and still is, that we consider the law settled by *The St. Johns* and *The Livingstone*. If, however, those cases are not binding and the entire question is reopened, we naturally reserve the right to take any position which can be supported by reason or precedent.

Respondent criticizes our treatment of the interest which the respondent carried as a self insurer. In this particular we merely followed the recovery statement prepared by respondent's brokers (Exhibit 9, p. 44). This treatment of respondent's retained line is also supported by the case of *Thames & Mersey Marine Insurance Co.* v. *British & Chilian S. S. Co., supra,* which the respondent cites in its brief. In that case (at p. 220) Scrutton, *J.*, contrasts *The Commonwealth* (1907) P. 216, and the *Armstrong* case, *supra,* thus bringing out very clearly the difference between an uninsured portion of the agreed value and an uninsured actual value in excess of the insured value.

We think this Court cannot fail to be impressed by the respondent's princely gesture in handing to the English P. P. I. underwriters a gratuity of $85,999.64 as "an act of grace" (Respondent's Brief, pp. 5, 11). As compared with this explanation we asked the Court to consider the explanation set forth in Appendix A attached to the petitioners' principal brief. After making this comparison the Court will

be in a position to decide whether the payment to the P. P. I. underwriters was prompted by a mere impulse of generosity or by a desire to buy off the English hull underwriters and prevent their joining the American underwriters in this litigation.

9. None of the cases cited by the respondent actually supports its argument.

To discuss each of the numerous cases cited by the respondent would unduly enlarge this reply, and we think such discussion is unnecessary. Respondent cites not only cases involving cargo, but cases involving surety bonds, fire insurance, insurance on real estate titles and automobile insurance. The one thing it does not cite is a case which deals with the precise question involved here, and decides it in accordance with the respondent's contentions.

The respondent cites the case of *Goole & Hull Steam Towing Co.* v. *Ocean Marine Ins. Co., supra,* as a case which criticizes the decision in the *Armstrong* case. As a matter of fact, the case does nothing of the sort. McKinnon, *J.,* unlike respondent in the present case, distinguishes carefully between the decision and the dictum in the *Armstrong* case, and while he recognizes that the dictum may be open to question, he does not intimate the slightest disagreement with the actual decision.

The respondent cites *Brown* v. *Merchant Marine Insurance Co.,* 152 Fed. 411, for the proposition that underwriters against total loss only are entitled to share in a recovery from third parties. That case appears to have gone off very largely on the question whether P. P. I. policies were necessarily illegal in the United States. The reasoning on which the Court based the apportionment between two different sets of underwriters is somewhat obscure, but that issue

is wholly irrelevant in the present case. On the other hand, we submit that the case affords a convincing demonstration of the wide and final acceptance of the *Armstrong* decision in this country. Although the assured in the *Brown* case had a large uninsured interest, consisting of the actual value of the vessel over and above the sum total of the insurance, it was never suggested that the assured had or could have any interest in the recovery.

10. The receipts which the respondent delivered to some of the petitioners have no bearing on the issues in this case.

In the pleadings respondent sets up the terms of certain receipts which were delivered to the petitioners some weeks after the payment of the loss. The lower courts considered these receipts immaterial, but as the respondent refers to them in its brief in this Court, we consider it necessary to deal with them here.

No subrogation receipt was taken in the case of the Aetna Insurance Company; but such receipts were taken in the cases of the other two companies, namely, The Boston Insurance Company and The Union Marine Insurance Company. At the outset it is important to bear in mind that these receipts were not signed by the petitioners (the insurance companies) but by the respondent; that they were not even presented to the petitioners until long after they had paid a total loss under their policies; and that the alterations in the printed forms were all made by the assured, or its brokers, without consulting the petitioners (R., pp. 55-57, 61-62, 52, 58).

The insurance companies acquired whatever rights they have at the moment when they paid the respondent the sums insured by their policies in full payment of a total loss. The Boston Insurance Com-

pany paid a total loss on or about December 16, 1918; and the Union Marine Insurance Company paid a total loss on or about December 5, 1918 (Stipulations, pars. 4). The subrogation receipts were not signed by the respondent until January 28, 1919 (Exhibits Annexed to Supplemental Stipulations). The relative dates clearly appear, in the Boston case for example, by a comparison of the date on the receipt, Exhibit 6 attached to the original stipulation (Exhibit 2), and the date on the subrogation receipt attached to the supplemental stipulation (Exhibit 3). In the latter, the date of the actual payment was originally written in; but this was crossed out, and the later date substituted.

It is obvious that the form of the printed subrogation receipt is not appropriate for a case in which an underwriter insures only a proportion of the agreed value, since the assured could not assign to each of the interested underwriters the entire right of recovery. Probably a careful lawyer would have modified the receipt by inserting a fraction, of which the numerator would be the amount insured, and the denominator would be the insured value (see passage quoted from Respondent's Brief, *supra,* pp. 9, 10). No doubt this same result was sufficiently indicated to business men by inserting the amount insured. Certainly it would never occur to an underwriter that the insertion of this amount in the printed form would deprive him of rights which he had acquired by a payment made a month before.

The provision with respect to costs and expenses in the receipt sent to the Union Marine Insurance Company clearly has no application to the present case. Quite apart from the fact that the document is not signed by the insurance company, we call attention to the fact that the last sentence is merely an agreement by the insurance company to indemnify the ship-

owner against any expenses "incurred in respect of any proceedings taken by virtue of this agreement". This language refers back to the opening words of the sentence, in which the shipowners agree "if called upon" to undertake any action or proceeding on behalf of the underwriters. There is no suggestion that the shipowners were ever called upon by the underwriters to proceed under this agreement, nor that the proceedings were actually taken pursuant to any such agreement. The stipulated fact is that the parties jointly retained counsel to represent their respective interests. Of course, if there had been no recovery, each client would have been responsible to the attorneys for its respective share of the expense. This result would follow, not from the printed form of subrogation receipt, but from the several individual and independent retainers.

In any event, it was of no importance, under the *Livingstone* decision, whether or not the petitioners contributed to the legal expenses. If they did so contribute, their contribution would merely be added to the amount they would be entitled to receive and retain out of the recovery.

The rights of the petitioners were fixed when they paid a total loss a month before the receipts were altered or signed:

> "From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss; and in a court of admiralty may assert in his own name that right of the

shipper. *The Potomac,* 105 U. S. 630, 634; *Phoenix Ins. Co.* v. *Erie Transportation Co.,* 117 U. S. 312, 321."

Liverpool Steam Co. v. *Phenix Ins. Co.,* 129 U. S. 397, at page 462.

The Circuit Court of Appeals for the Sixth Circuit said in *Federal Insurance Co.* v. *Detroit Fire & Marine Insurance Co.,* 202 Fed. 648, at page 651:

> "Most of the insurers obtained subrogation receipts from the owner upon paying their shares of its loss, some of which in terms provided for full subrogation, and others 'to the extent only and as provided in' the policies, although the policies do not appear to have contained any provision for subrogation. However, we do not regard this as important, nor do counsel for either side, because it is settled that such provisions are not necessary. The right of subrogation arises from the very nature of the contract of insurance as a contract of indemnity. *Phoenix Ins. Co.* v. *Erie Transportation Co.,* 117 U. S. 312, 321, 6 Sup. Ct. 1176, 29 L. Ed. 873; *Liverpool Steam Co.* v. *Phenix Ins. Co., supra,* 129 U. S. 462, 9 Sup. Ct. 469, 32 L. Ed. 788; *North England Ins. Ass'n.* v. *Armstrong,* L. R. 5 Q. B. 244; *Comegys* v. *Vasse,* 1 Pet. 193, 212, 7 L. Ed. 108."

See also:

Phillips on Insurance (§1723);
Atlantic Insurance Co. v. *Storrow,* 5 Paige 285;
Joyce on Insurance (§3538).

The alterations in the receipts were made by the brokers, and were never seen by the insurance com-

panies until long after the payment of the loss; it is not claimed that the petitioners agreed to them (R., pp. 56, 61).* The retention of the altered receipts by petitioners could not be a waiver of any of their rights, since no consideration is shown or even claimed for such a waiver; nor is there any claim of estoppel, as it is not even suggested that the respondent ever changed its position because of these receipts. The petitioners were under no duty to protest if the receipts were inaccurate. They could have torn up the receipts and thrown them away if they saw fit. Their claim is not based on the receipts and cannot be affected by these receipts, which came to hand long after the rights of the petitioners were fixed.

The answers allege that the payments were made "under and pursuant to the following subrogation agreement". The stipulated facts, however, show clearly that there is no foundation for this statement. The payments were made under and pursuant to the terms of the insurance policies; and no receipt was taken at the time excepting the plain receipt attached to the payment order, which appears as Exhibit 6 attached to the principal stipulation in the Boston case (R., p. 55).

If the circumstances surrounding the alteration of these receipts and their subsequent return to the insurance companies were such as to make the altered

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* The copy of the Union Marine Insurance Company receipt shown at page 62 of the record is a printed copy instead of a photostatic copy, and therefore does not show that the words "to the extent of but not exceeding $6326" appearing twice therein, were the handwriting insertions added by Johnson & Higgins, referred to in paragraph 1 of the stipulation of facts (R., p. 61). The respondent has agreed, however, that we may state that fact to the Court, and we have a certified photostatic copy which we can file with the clerk if necessary.

form of the receipts in any way binding on the petitioners, the respondent would undoubtedly have offered some evidence to that effect. As the case stands, however, we have nothing but the bare fact that these documents were altered and returned to the insurance companies many weeks after the latter had paid a total loss. The receipts were of no importance and no attention was paid to them by either of the parties until the present litigation arose, when it was feebly suggested that perhaps the petitioners should have returned the receipts or protested against them. The petitioners were under no such duty and their failure to protest was quite unimportant. As the District Court correctly held, the receipts are wholly without significance.

Dated, New York, April 22, 1938.

Respectfully submitted,

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